No. 20,218

See Vol. 3339

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

TACOMA GRAVEL & SUPPLY CO., INC., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

APPELLANT'S PETITION FOR REHEARING

BAREFOOT SANDERS,
Assistant Attorney General

ROBERT C. WILLIAMS,
United States Attorney,

ALAN S. ROSENTHAL,
FLORENCE WAGMAN ROISMAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,218

UNITED STATES OF AMERICA,

Appellant,

v.

TACOMA GRAVEL & SUPPLY CO., INC., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

APPELLANT'S PETITION FOR REHEARING

Appellant, the United States of America, respectfully petitions this Court for rehearing of the judgment entered in this case on January 25, 1967. The bases for this petition are set forth below:

1. The United States brought this suit to recover the unpaid balance of and accrued interest on a judgment previously entered in the Superior Court of the State of Washington. The district court rendered summary judgment for the defendants [1] on

---

1/ Tacoma Gravel and Supply Co. had been dismissed on motion of the United States (R. 44).

the ground that the Government's suit was barred by a Washington statute, R.C.W. 4.56.210, which prohibits suit on any state judgment more than six years after entry of the judgment. On January 25, 1967, this Court affirmed the district court's decision, holding that the original judgment in favor of the United States, being more than six years old, "is dead" (Sl. Op. p. 3). Acknowledging that, under United States v. Summerlin, 310 U.S. 414, the United States could not be subjected to any state statute which "undertakes to invalidate [a] claim of the United States" (310 U.S. at 417), this Court expressly declined to decide whether R.C.W. 4.56.210 "also operates to cut off the claim underlying [the] judgment" (Sl. Op. p. 3).

a. In our view, a state statute cannot bar a claim of the United States, regardless of whether the claim be on a judgment or inchoate. Indeed, as we urged in our main brief (pp. 6-8), the reasons for protecting the sovereign from limitations on judgment claims are peculiarly strong. And, as we also indicated in our main brief (pp. 8-9), it long has been established that statutes like the one in issue here cannot apply to the United States. Because we thought it well settled that a limitation on suits on judgments could not bar a suit by the sovereign, we did not deem it necessary to discuss in our brief the question whether, if the United States were barred from suing on its judgment, it could still resort to suit on its underlying claim.

b. Contrary to our position, this Court concluded that Summerlin does not preclude the application against the United States of state statutes of limitations relating to judgments. The Court's reasoning was that the Summerlin doctrine only prevents the extinguishment of the underlying claim.

Having reached this conclusion (which we believe to be erroneous), it perforce became necessary for the Court to decide whether the extinguishment of the judgment automatically destroyed the underlying claim as well. This inquiry was required because, if the effect of applying the state limitation on judgments is to divest the United States of any cause of action against the appellee debtors, then, as this Court recognized, Summerlin comes into play. Once again, Summerlin holds expressly that a state statute of limitations which purports to "invalidate the claim of the United States, so that it cannot be enforced at all" is a "transgres[sion of] the limits of state power." 310 U.S. at 417.

Insofar as we can determine, however, this Court did not address itself to this question. While reserving decision on the question as to whether if a suit were now brought on the underlying claim it could be deemed barred by limitations, there is no reference in the Court's opinion to the more basic issue: whether, limitations aside, the United States

any longer has a cause of action to assert.

The answer to this question is clear. As we show below, there is no room for doubt that the claim merged in the judgment and, therefore, no further suit on the claim is possible. Thus, R.C.W. 4.56.210 not merely operates to invalidate the judgment but, in addition, destroys the Government's claim.

2. The authorities are unanimous on the proposition that claims merge in judgments obtained thereon -- and are no longer enforceable except by the enforcement of the judgment. As stated in Freeman, Judgments (5th ed. 1925), §546 (footnotes omitted):

> The cause of action, though it may be examined to aid in interpreting the judgment, can never again become the basis of a suit between the same parties. It has lost its vitality; it has expended its force and effect. All its power to sustain rights and enforce liabilities has terminated in the judgment or decree. It "is drowned in the judgment," and must henceforth be regarded as functus officio.

And as enounced in the Restatement of Judgments (1942), §47:

> Where a valid and final personal judgment in an action for the recovery of money is rendered in favor of the plaintiff,
> (a) the plaintiff cannot thereafter maintain an action against the defendant on the cause of action; but
> (b) the plaintiff can maintain an action upon the judgment.

Accord: Black, Judgments (2d ed. 1902) §674. In this Court's words (Filice v. United States, 271 F. 2d 782, 783 (per curiam),

certiorari denied, 362 U.S. 924):

> the common law doctrine is that the original cause of action becomes merged in the judgment, and all the plaintiff can thereafter do is to sue on the judgment. 2/

In sum, R.C.W. 4.56.210 cannot be applied here. Since the Government's claim merged in its judgment, to apply the state statute would be to destroy the claim and leave the United States powerless to recover on appellee's indebtedness to it. Even under this Court's limited reading of the scope of Summerlin, state statutes plainly cannot be given that effect.

Since, therefore, the United States cannot sue on its underlying claim, if R.C.W. 4.56.210 can apply to the United States then it completely destroys not only the judgment but the claim which has merged into the judgment. Because, as this Court recognized, the Supreme Court has held that no state statute may so invalidate a claim of the United States, R.C.W. 4.56.210 cannot be applied to the Government. For this reason, the district court erred in holding that R.C.W. 4.56.210 could bar the Government's suit on its judgment against the Stanways.

2/ The common law rule is, of course, the rule in Washington. See Fisher v. Schwabacher Hardware Co., 109 Wash. 257, 186 P. 549 (1920).

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted and the judgment of the district court should be reversed.

BAREFOOT SANDERS,
Assistant Attorney General,

ROBERT C. WILLIAMS,
United States Attorney,

ALAN S. ROSENTHAL,
FLORENCE WAGMAN ROISMAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

FEBRUARY 1967

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing, is, in my judgment, well founded and presented in good faith, no for the purpose of delay.

FLORENCE WAGMAN ROISMAN
Attorney,
Department of Justice,
Washington, D. C. 20530.
Attorney for Appellant.

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 1967, I air mailed five copies of the foregoing petition for rehearing, postage prepaid, to counsel for appellees, addressed as follows:

Floyd V. Hicks, Esquire
Warren J. Daheim, Esquire
Blair, Thomas, Hicks, O'Hern
& Hokanson
502 Rust Building
Tacoma 2, Washington

Alan S Rosenthal

ALAN S. ROSENTHAL
Attorney, Department of Justice,
Washington, D. C. 20530.